Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM 1975

No. 75-102

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, EASTERN SECTION.

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No._____

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, EASTERN SECTION.

Petitioners, Walter Lee and and Virginia McElroy, respectfully pray that a writ of certiorari issue to review the judgment of the Tennessee Court of Appeals, Eastern Section, which affirmed a decree of the Chancery Court, Part 1, of Hamilton County, Tennessee.

OPINIONS BELOW

The opinion of the Tennessee Court of Appeals, Eastern Section, 522 SW2d 345, is attached as Appendix C. The opinion of the Chancery Court, Part 1, of Hamilton

County, Tennessee, not reported, is attached as Appendix B.

JURISDICTION

The judgment of the Tennessee Court of Appeals, Eastern Section, was entered on February 7, 1975. Petitioners sought discretionary review in the Supreme Court for the State of Tennessee which was denied by an order entered by the Supreme Court for the State of Tennessee on April 21, 1975, which is attached as Exhibit A. This petition was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 USCA 1257(3).

QUESTIONS PRESENTED

1. Whether the registration of an abandoned minor child and the administrative appointment of a guardian in Korea pursuant to Korean Law, which cut off the rights of the natural parents and vested authority to consent to adoption in the guardian, were acts of state of Korea?

2. Whether the acts of the Mayor of Seoul, Korea and a local administrative district can be the acts of state of the sovereign nation of Korea?

3. Whether a state court in the United States can disregard the acts of Korea, in terminating the parental rights to a minor child and vesting the right to consent to adoption in a guardian, by holding that such acts did

not provide adequate notice to the natural parents and were contrary to the public policy of such state?

STATEMENT OF THE CASE

A. How a Federal Question is Presented

The questions presented by this case relate to the scope of the act of state doctrine under federal common law. The Tennessee State Court refused to apply the act of state doctrine to the acts of Korean administrative officials in registering a child as an orphan and appointing a guardian.

The petitioners asserted that the act of state doctrine required a finding by the Tennessee Court that the Korean administrative acts vested parental authority in the guardian and terminated any parental rights that may have been possessed by respondent. This contention was first raised in a motion for summary judgment (tr. 281-282), renewed on a motion to dismiss respondent's complaint at the close of respondent's evidence (tr. 281-289), and raised again at the close of all evidence (tr. 408-410). The Chancery Court specifically stated in its opinion that the act of state doctrine did not apply to the case. (Appendix B, p. 23). On appeal to the Tennessee Court of Appeals, two of the three assignments of error were based on the act of state doctrine. (Appendix C, p. 26). The Tennessee Court of Appeals ruled that the act of state doctrine did not apply to the case. (Appendix C, p. 33).

The interpretation of the act of state doctrine is exclusively a matter of federal common law:

> "However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Banco Nacional De Cuba v. Sabbatino,* 376 U.S. 398, 425, 84 S.Ct. 923, 939, 11 L.Ed. 2nd 804, 822 (1964).

In the *Sabbatino* case, *supra,* the court held that although the act of state doctrine is not spelled out by the text of the constitution, the doctrine has " . . . 'constitutional' underpinnings. It arises out of the basic relationship between branches of government in a system of separation of powers." 376 U.S. at 423, 84 S.Ct. at 938, 11 L.Ed. 2nd at 821.

The status of the act of state doctrine as a matter of exclusive federal law provides a basis for review by this court. The existence of jurisdiction could either be based on congressional intent in the general language of 28 USCA 1257(3) or specifically because petitioner is asserting a right based upon the Federal Constitution. Moore, Federalism and Foreign Relations, 1965 *Duke L. J.* 249, 277-284 (1965).

In any case, this court has clearly held that a question of federal common law, such as the act of state doctrine, provides a basis for Supreme Court review of a state court decision. In the *Sabbatino* case, supra, the

court said that the areas closest in point to the federal common law status of the act of state doctrine were the bodies of law applied in controversies between states over boundaries and regarding the apportionment of interstate waters. The court relied heavily on *Hinderlider v. La Plata River Co.,* 304 US 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1937). 376 US at 426, 84 S.Ct. at 939, 11 L.Ed 2nd at 822. The *Hinderlider* case was a decision relating to the opportionment of interstate waters which had been made by a state court. The question of whether the federal common law provided a basis for Supreme Court appellate jurisdiction was argued, 304 US at 94, 82 L.Ed. at 1204, and the court specifically decided that it could review the state court decision, 304 U.S. at 110, 58 S. Ct. at 810-811, 82 L.Ed. at 1212-13. See also *Delaware River Commission v. Colburn,* 310 U.S. 419, 427, 60 S.Ct. 1039, 1041, 84 L.Ed. 2nd 1287, 1289 (1940).

B. Facts

This case began as a petition for adoption filed by petitioners in the Chancery Court in Tennessee. Petitioners sought to adopt a minor child named Ji Yung Kim who had been born in Korea. Petitioners based their right to adopt upon the consent of the Holt Adoption Program, Inc., (Holt), which was the successor to a guardian of Ji Yung Kim who had been appointed by the Mayor of Seoul, Korea. (Tr. 332, 341; Exhibit E of Ex.

18).Holt is a non-profit corporation, incorporated in the State of Oregon engaged in international child care and placement. (Tr. 297).

Respondent filed a suit in the same Tennessee court against petitioners, claiming that he was the natural father of Ji Yung Kim and asking that the petitioners be enjoined from adopting the child. The Tennessee trial court treated the complaint as an intervening petition in the adoption proceeding and held a hearing on the issues in the case. The Tennessee trial court found that respondent was the father of the child and that his parental rights had not been terminated and refused to give effect to the consent to adoption by Holt. (Appendix B, p. 23).

The events leading up to this controversy took place in the Republic of Korea. Holt is licenced by the Korean government as an adoption agency and operates to facilitate the adoption of mixed race children (that is, children who are not of pure Korean ancestry) born in Korea (Ctr. 295-296). It has received assistance from the executive and legislative branches of the United States Government in doing this (Tr. 301).

Mixed race children are excluded from participation in Korean society by the cultural practices of that society (Tr. 292-293). These cultural practices appear to have a historical basis and were developed as a means of maintaining a racially pure society in the face of foreign in-

vasions of Korea (Tr. 293). The cultural bias against mixed race persons results in their being not accepted in society, having no future and being literally "non-persons" (Tr. 293, 346).

One of the principal elements in carrying out the exclusion of mixed race persons in society is the Korean family registration system. At birth the father of a Korean child is required to register the child in his official family registration records (Tr. 310). There are no birth certificates or fingerprint records of birth (Tr. 309). The family registration is the basic personal identity record in Korean society and is required for such things as applying for schooling, a job, or passport. (Tr. 310-311. All family background, divorces, debts, etc., of the family are recorded on this registration. The family registration is maintained by district offices, which are sub-county units of government in Korea (Tr. 310).

In the case of a mixed race child born of a Korean mother and a foreign father, no family registration is possible through the non-Korean father (Tr. 343). The Korean law does provide that the mother may register the child into her family but most mothers refuse to do this because it means entering a record of an illegitimate mixed race child on their family record (Tr. 310-311). The child then has no family registration, cannot participate in Korean society and is commonly abandoned by the mother (Tr. 307-308, 311).

The plight of these mixed race children is a national problem in Korea. In recent times a large number of mixed race children have been born of Korean women and American servicemen (Tr. 292). One solution to this problem is foreign adoption of these mixed race children, and to facilitate this Korean law has established a procedure for creating a basis for adoption of abandoned mixed race children. When a child is abandoned the police deliver the child to a child caring agency in Korea (Tr. 308-309). In the case of Ji Yung Kim, she was delivered to the Holt adoption agency on June 4, 1971, together with an official request from the county government to arrange an adoption of a mixed race child (Tr. 319-321; Ex. 18, p. 3, Exhibit B).

The next step is to obtain a family registration for the child. This is done by submission of a statement of discovery of abandoned child to the district office. The district office then conducts an investigation and submits a report to the Korean Court of Family Affairs. This court then authorizes the creation of an entirely new family registration which has the child as the sole member of the family (Tr. 321-323, 327-329; Ex. 18, p. 3-4). *Korean Civil Code,* Article 781; *Korean Family Affairs Judgment Law,* Article 2, clause 1. The involvement of the Korean Court of Family Affairs appears to be purely of an administrative nature and one of the administrative

functions which are performed by Korean courts. See, Supreme Court of Republic of Korea, *Korean Legal System,* 60 (1964).

In Ji Yung Kim's case the family registration certificate was issued by the Ma Po District office which is located in Seoul, Korea where the Holt adoption agency and the child were located (Ex. 18, p. 3). The registration certificate was issued on July 22, 1971 and recited that Ji Yung Kim was born June 6, 1967 and was without parents (Tr. 327; Exhibit C of Ex. 18). Ji Yung Kim's status as an orphan was later confirmed by the Ma Po district office through a certificate of orphanhood (Ex. 18, p. 5-6, Exhibit F).

Under Korean law the Mayor of Seoul, Korea is empowered to appoint a guardian for a child whose family registration shows him to be an orphan (Tr. 340; Ex. 18, p. 4), *Korean Law pertaining to the Guardianship for Orphans under Institutional Care,* Law No. 703, Article 2, clause B. Holt adoption agency filed an application for a certificate of appointment of guardian with the Mayor of Seoul (Exhibit D of Ex. 18). Under Korean law the affixing of the official seal of the Mayor transformed such application into the certificate appointing a guardian (Tr. 329-330; Ex. 18, p. 2-3).

The Mayor of Seoul, Korea appointed Deuk Hwang Kim as the guardian of Ji Yung Kim on July 24, 1971.

(Tr. 329-332; Exhibit D of Ex. 18). Deuk Hwang Kim was a member of the Board of Directors of Holt and the representative of Holt. (Tr. 331-332). Under Korean law, a guardian appointed by this procedure is deemed to have sole parental power over the child, including the right to consent to adoption when the child is under 15 years old. (Ex. 18, p. 5) *Korean Civil Code,* Articles 871 and 928. On July 24, 1971, Deuk Hwang Kim transferred all his rights as guardian to Holt, including the right to consent to adoption. This transfer was permitted under Korean law (Ex. 18, p. 5; Exhibit E). Holt subsequently consented to the adoption of Ji Yung Kim by petitioners (Tr. 341).

During the period when the family registration and appointment of guardian took place in Korea, Ji Yung Kim was physically present in Seoul, Korea. She did not come to the United States until February 24, 1972 (Tr. 77, 343). Ji Yung Kim was a Korean citizen (Tr. 346-347).

The procedure for securing parental authority to consent to adoption, described in this case, had been followed by Holt from 1956 until the time of trial, in excess of 12,000 other American adoptions of Korean children, as well as 2,000 adoptions in Europe. (Tr. 293-294, 334-335).

REASONS FOR GRANTING THE WRIT

1. The Decision By The Tennessee Court Not To Apply The Act Of State Doctrine Raises Significant Questions As To The Legal Status Of Large Numbers Of Foreign Born Children Who Have Been Adopted In The United States.

The Tennessee court held that the Korean procedure, which vested the parental right to consent to adoption in Holt, was invalid because insufficient notice had been given to the natural parents of the child.

The procedure followed in this case has been used by Holt in the placement of over 12,000 children for adoption in all fifty states of the United States. If this procedure was invalid and cannot be relied upon as an effective method of vesting Holt with parental authority to consent to adoption, then the legal status of these 12,000 children is in jeopardy. Any other adoption of a Korean child in the United States, based on the consent of Holt, will be subject to the same danger of claim of invalidity based on the individual state public policy.

Holt is only one of a number of adoption agencies placing children from other countries for adoption in the United States. Rondell and Murray, *New Dimensions in Adoption*, 5, 30-31, (1974).Presumably these other agencies, at least in the case of Korean children, would be relying upon some similar procedure. Further, Holt and other agencies have recently brought a large number of children from Vietnam to the United States and

Holt has placed a small number of children from Bangladesh in the United States (Tr. 300-310). To the extent the Tennessee courts' decision casts doubt on the official acts in other nations authorizing these adoptions, the status of these children is also threatened. This is dramatized by the recent air lift of hundreds of children from Vietnam by Holt and other international agencies shortly before the fall of South Vietnam.

2. THE DECISION BY THE TENNESSEE COURT IS COMPLETELY CONTRARY TO THE ACT OF STATE DOCTRINE AS DEFINED UNDER FEDERAL LAW AND IS AN ATTEMPT BY A STATE COURT TO LIMIT THE APPLICATION OF FEDERAL LAW.

Interpretation of the act of state doctrine is exclusively a matter of federal law and no state may limit the application of that doctrine on the basis of its own law or policy. *Banco Nacional De Cuba v. Sabbatino,* supra, 376 U.S. at 424, 84 S. Ct. at 938, 11 L. Ed. 2nd at 821; Henken, The Foreign Affairs Power of the Federal Courts; Sabbatino, 64 *Columbia L.R.*, 805 (1964).

In this case, the Tennessee Court of Appeals specifically stated in its opinion that it would not apply the act of state doctrine because the only state action involved was administrative action by officers of the city of Seoul, Korea and that action taken by a subdivision of a government cannot fall within the act of state doctrine. (Appendix C, p. 33). This is a complete and fundamental misinterpretation of the act of state doctrine as it has

been applied in previous decisions by this court and other courts. The question presented by the act of state doctrine is not the identity of the specific actor but whether the act is one authorized by or on behalf of a sovereign state:

> "In determining whether an act is an act of state, the branch or agency of the government--executive, judicial, or legislative--that performed the act is not as important as is the nature of the action taken." ALI, *Restatement of Foreign Relations Law,* Sec. 41, comment d, p. 127 (1965).

A state can only act through some agent and could by statute or decree establish almost any person or entity as an agent to carry out its interests. The question is whether the act involved was sanctioned by law in a foreign country to achieve its interests. See: Reeves, The Sabbatino Case, 32 *Fordham L. Rev.* 631, 647-651 (1964); Cornell Law School, *International Law in National Courts: Proceedings of the 3rd Summer Conference on International Law,* 65-68 (1960).

What the Tennessee Court of Appeals ignored in reaching its decision was the fact that the district chief in the Ma Po office and the Mayor of Seoul, Korea acted as they did in conformance with Korean statutes which authorized them to establish family registrations and appoint guardians on behalf of Korea.

In no case previously decided in this court, or in any lower court, is there any suggestion that the act of state

doctrine is limited by the nature of the actors. In a number of other cases this court and other courts have applied the act of state doctrine to acts undertaken by persons who could not clearly be called officials of a foreign national government. For example: *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909) (Soldiers in the Costa Rican Army); *Shapleigh v. Mier*, 299 U.S. 468, 57 S. Ct. 261, 81 L. Ed. 355 (1937) (expropriation decree of governor of a Mexican state); *Union Shipping and Trading Co. v. United States*, 127 F. 2d 771 (2nd Cir. 1942) (port captain of a french port); *United States ex rel. Von Heymann v. Watkins*, 159 F. 2d 650 (2nd Cir. 1947) (Costa Rican police officers); *Carl Ziess Stiftung v. V.E.B. Carl Ziess, Jena* 293 F. Supp 892 (S.D. NY 1968), affirmed 433 F.2d 686, 703 (2nd Cir. 1970) cert. den. 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed. 2d 681 (Decree of German state government). In *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 NY 474, 14 NE 2d 798 (1938) it was even held that the acts of a private corporation in discharging a jewish employee, in conformance with Nazi decrees discriminating against Jewish persons, fell within the act of state doctrine.

Perhaps the clearest holding of this nature is in the first Bernstein case, *Bernstein v. Van Heyghen Freres S.A.*, 163 F. 2d 246 (2nd Cir. 1947), cert. den. 332 U.S. 772, 68 S. Ct. 88, 92 L. Ed. 357. The plaintiff was seeking

to recover the insurance proceeds from a vessel which he had been forced by threats of imprisonment and death to transfer to a person designated by the Nazi government, while plaintiff was being held in custody in Germany in 1938. The record did not clearly show exactly who had arrested plaintiff and threatened him, but Judge Learned Hand held that the act of state doctrine would apply because the nature of the acts described could only have been undertaken by persons acting on behalf of the then German government to carry out their policies against Jews, 163 F. 2d at 248.

3. This Case Raises A Significant And Unsettled Question Of What Type Of State Acts, Other Than Expropriation Of Property, Fall Within The Act Of State Doctrine.

The erroneous limitation of the act of state doctrine by the Tennessee Court of Appeals, based upon the nature of the actors, prevented that court from reaching a fundamental problem posed by this case: What exactly is an act of state?

The act of state doctrine in the United States basically dates back to 1897 and the case of *Underhill v. Hernandez*, 168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 2d 456 (1897). The definitive opinion on the act of state doctrine is *Banco Nacional De Cuba v. Sabbatino*, supra. The *Sabbatino* opinion reaffirms the act of state doctrine as a special conflict of laws rule, based on federal law,

which requires deference to the acts of a foreign sovereign within its own territory and forbids reexamination of the validity of those acts either under local law, international law or the law of the forum. Henken, Act of State Today: Recollections in Tranquillity, 6 *Col J. of Transnational Law* 175, 178 (1967): Kirgis, Act of State Exceptions and Choice of Law, 44 *Univ. of Colo L.R.* 173 (1972).

When the act of state doctrine does not apply courts are free to use ordinary choice of law rules relating to foreign law and foreign judgments, which allows the forum to reject the foreign law on the basis of the public policy of the forum. ALI, *Restatement of Foreign Relations Law*, supra, sec. 41, comment c, p. 126-127.

The question is how do you distinguish an act of state from an ordinary choice of law situation. This case squarely presents that issue, because the Tennessee courts held the Korean procedure contrary to the public policy of the forum and unenforceable, which could not be done if the acts involved were acts of state. ALI, *Restatement of Foreign Relations Law*, supra, sec. 41, comment g, p. 130; Falk, *The Aftermath of Sabbatino, Proceedings of the 7th Hammerskjold Forum*, 32 (1965). Neither *Underhill v. Hernandez*, supra nor the *Sabbatino* case, supra, discuss the scope of the act of state doctrine in any detail. *Sabbatino* involved a foreign expropriation as an act of state. The most recent case in this court also

involved expropriation. *First National City Bank v. Banco Nacional De Cuba*, 406 U S. 759, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972).

Many courts have, without particular discussion of the issue, applied the act of state doctrine in a number of instances when something other than a foreign expropriation was involved. For example: in *Underhill v. Hernandez*, supra, the original act of state case, the acts involved were those of a revolutionary army commander in refusing to let an American citizen leave his country and acts of assault; In *American Banana Co. v. United Fruit Co.*, supra, the acts of state included soldiers stopping construction of a railway to frustrate the plaintiff's attempt to operate a banana plantation. Other examples are: *Union Shipping and Trading Co. v. United States*, supra, (act of a port captain in ordering the grounding of a damaged ship); *United States, ex rel Von Heymann v. Watkins*, supra, (arrest by Costa Rican police and release to United States authorities); *Vanity Fair Mills v. T. Eaton Co.*, 234 F. 2d 633 (2nd Cir. 1956), cert den. 352 U.S. 871, 77 Set. 96, 11 L Ed. 2d 76 (registration of a trademark by Canada); *Carl Ziess Stiftung v. V.E.B. Carl Ziess, Jena*, supra, (creation of a domicile for a foundation); *Menedez v. Saks and Co.*, 485 F. 2d 1355 (2nd Cir. 1973) cert. granted 416 U.S. 981, 94 S. Ct. 2382, 40 L. Ed. 2nd 758 (refusal to repay

money paid to state by mistake); *French v. Banco Nacional De Cuba,* 23 NY 2d 46, 295 NYS 2d 433, 242 NE 2d 704 (1968) (currency regulations of a foreign government).

The specific acts involved in the present case were not expropriations of property. The two key acts were the registrations of a minor child as an orphan and the appointment of a guardian for the minor child. Taken together they terminated the rights of the natural parents and vested a right to consent to adoption in Holt. They related to the personal status of a Korean citizen who was located in Korea at the time the acts took place. Korea had jurisdiction to determine status under generally accepted principles relating to over personal status, ALI *Restatement of Conflicts,* 2nd, Sec. 79 (1969) and this was not an attempt to undertake acts with extraterritorial affect. The acts were clearly of an administrative nature. The acts were essentially ex parte and did not involve any function of settling a dispute between private interests. The basic rationale for the procedure was to facilitate adoption of mixed race children outside Korea.

There is one case in the United States that held that a foreign state determination of one type of personal status was an act of state. In *United States ex rel Stienvorth v. Watkins,* 159 F 2d 50 (2nd Cir. 1947), which held the act of Cost Rica in denationalizing one of its

citizens to be an act of state. No United States case could be found dealing with acts establishing status as an orphan and appointing a guardian as an act of state. There is an older English case, frequently cited in the early American cases as a basis for the act of state doctrine, which held that the appointment of a guardian over property by a foreign sovereign was an act of state. *Duke of Brunswick v. King of Hanover,* 9 Eng. Rep. 993 (1848).

The basic question still remains: How do you decide when an act undertaken in a foreign state is to receive the special treatment of the act of state doctrine? The ALI, *Restatement of Foreign Relations Law* defines an act of state as an act . . . "by which that state has exercised its jurisdiction to give effect to its public interests", sec. 41, and in comment d to that section, the statement is made that an act of state ". . . involves public interests of a state as a state, as distinct from its interest in providing the means of adjudication of disputes or claims that arise within its territory", p. 127.

The acts involved in this case would fit within the act of state doctrine. The key element involved is the national interest of Korea in solving the problem of mixed race children in their society. The Korean government is attempting to find a solution to this problem which reconciles the best interests of those mixed-race children and the particular cultural practices in their

society. Adams and Kim, a Fresh Look at Intercountry Adoptions, 18 *Children*, 214, 218 (1971). To achieve their national interest the Korean Government works with Holt and other agencies and has established a procedure to facilitate adoption of mixed race children in foreign countries. The acts involved in this case are this procedure. They are of an administrative nature and certainly relate to the political interests of Korea in the sense that Korea is interested in seeing that the adoption of mixed race children be accomplished in other countries. The acts are to carry out a national policy and solve a national problem. The appropriate arms of United States government, the executive and congress, have in the past worked with Holt and other agencies to assist in these adoptions and regulate the process through the immigration laws of the United States. See note, Immigration Laws, Procedures and Impediments Pertaining to Intercountry Adoptions, 4 *Denver J. of Int. Law and Pol.*, 257 (1973); Adams and Kim, *supra*, 220.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tennessee Court of Appeals, Eastern Section.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

IN RE: Adoption by WALTER LEE	)	
McELROY and VIRGINIA LEE W.	)	
McELROY, Petitioners	)	
EX PARTE	)	Hamilton
and	)	Equity
MR. and MRS. WALTER LEE McELROY,	)	
Petitioners	)	
VS.	)	
RICHARD LOUIS TAYLOR,	)	
Respondent	)	

ORDER

Upon consideration of the petition for certiorari and the entire record in the cause,

We are of the opinion that the Court of Appeals correctly dealt with the assignments of error in the court and no new issues having been raised on the petition herein, the writ is denied.

PER CURIAM

Brock, J., not participating

APPENDIX B

CHANCELLOR'S MEMORANDUM OPINION

The Court finds that the petition for adoption by the McElroy's must be dismissed because the child sought to be adopted by them is the natural child of Richard Louis Taylor and his former Korean wife, Kyong Cha Taylor, and that the parental rights of Richard Louis Taylor have not been lawfully terminated. Upon this point the Court finds specifically that the father, Richard Louis Taylor, never at any time abandoned said child nor did he ever voluntarily surrender said parental rights nor in any way relinquish said rights voluntarily. The Court is not persuaded that the argument advanced by the McElroy's that the so-called "Act of State Doctrine" applies in this case. The father was an American citizen and by virtue of Section 1401, USCA, so was the child; and the Korean government took no action which would accord due process of law to terminate the parental rights of Mr. Taylor.

Some question has been raised whether or not the child before the Court is the same child as the natural child of Mr. Taylor; but the Court having personally viewed the child in open court and having viewed many photographs which are exhibited in evidence taken over a period of years from the birth of the child and from the testimony and other documents in the record, is firmly convinced that the natural child of Mr. Taylor is the

same child as that before the Court. The Court is further convinced that the Holt Adoption Agency has not been helpful to the Court on the information available to it up to this point, although it did make said information known to the U. S. Department of State because the Department of State knew the date, the hour and the flight that said natural child of Mr. Taylor was placed on in Seoul, Korea for destination to Chicago, Illinois and eventually to be adopted by the McElroy's in Chattanooga.

The Court finds that the McElroy's are splendid people and in every way fit to be adopting parents of this child, but denies the petition because the parental rights of Mr. Taylor have not been terminated and he is before the Court asserting those rights.

The Court likewise finds that Mr. Taylor is a fit and proper person to have custody of said child and by virtue of being the natural father his rights are superior in that he has not abandoned or otherwise surrendered these rights. The Court further finds that Mr. Taylor has divorced the Korean mother of said child and has remarried and is able, financially, socially and in other ways, to afford a proper home for the upbringing of said child. At the conclusion of the hearing in this cause, the Court granted to Mr. Taylor additional time within which to seek whatever information the U. S. Department of State might have upon which it based its state-

ment which appears in the record that the natural child of Mr. Taylor, Kimtra Francoise Taylor, was one in the same child as the one before the Court. The Court did this, not because of any doubt in the mind of the Court at the time of the evidence then before the Court that the child before the Court was the natural child of Mr. Taylor, but solely in order that the record might be more complete. The result is that the adoption petition will be dismissed and that the intervening petition praying for custody of the child will be granted.

APPENDIX C

OPINION

Sanders, J. the Defendents have appealed from a decree of the Chancery Court denying their petition to adopt an infant child and awarding her custody to the natural father.

The Defendants, Walter Lee McElroy and wife, Virginia Lee W. McElroy, filed a petition in the Chancery Court of Hamilton County to adopt an infant child which was born in Korea.

The Plaintiff, Richard Louis Taylor, filed suit in the same court alleging that he was the natural father of the child and that he had not consented to the adoption. He asked that the Defendants be enjoined from adopting the child and asked that her custody be given to him.

The Chancellor treated the complaint of the Plaintiff as an intervening petition in the adoption proceeding and heard the case on oral testimony. The Chancellor found the issues in favor of the Plaintiff and dismissed the Defendants' petition to adopt the child and awarded her custody to the Plaintiff.

The Defendants have appealed to this court and assigned error as follows:

1. The Court erred as a matter of law in holding that the Act of State Doctrine did not apply in this case.

2. The Court erred as a matter of law in refusing to recognize the Act of a Foreign State and in exercising jurisdiction on the Act of a Foreign State which is reserved solely to the Executive Branch of the United States Government by the United States Constitution (Art. II).

3. The Court erred in reaching its conclusion concerning the identification of the McElroys' child; and in holding that Mr. Taylor had parental rights in an illegitimate child in the absence of testimony from the natural mother, and in further holding that Mr. Taylor had not abandoned or otherwise surrendered his alleged parental rights.

The proof shows that the Plaintiff was assigned to duty with the United States Army in Korea in April of 1966. In August of that year he met a Korean girl named

Kim Kyong Cha and shortly thereafter they started living together on a permanent basis. In April, 1967, the Plainitff was transferred back to the United States. At the time of his transfer Kim Kyong Cha was six to seven months pregnant. On June 6, 1967, she gave birth to a baby girl. The child was named Kimta Francoise Taylor.

In February, 1968, the Plaintiff returned to Korea for the purpose of marrying Kim Kyong Cha and legitimating their child. In March, 1968, the Plaintiff and Kim Kyong Cha were married in Seoul, Korea, and their daughter, Kimta Francoise Taylor, was issued an American passport as a United States citizen.

It was the intention of the Plaintiff to bring his wife and daughter back to the States with him but due to delay in issuing a visa and passport to his wife, the Plaintiff returned to the States without them in April, 1968, with the understanding that they would follow as soon as the papers could be processed.

The proof indicates that after the Plaintiff returned to the States his wife lost interest in coming here. The Plaintiff kept up his correspondence with his wife and it was her insistence that she could not get a visa. The Plaintiff had his last correspondence from his wife in June, 1970.

In March, 1971, the Plaintiff learned that in July, 1970, his wife had abandoned their child. She had left

the child and gone to a store and was never heard from again.

After this the Plaintiff had considerable correspondence with friends and acquaintances in Korea concerning his child and learned that the people who had been taking care of her since she was deserted by her mother were considering placing her in an orphanage for adoption.

At about this juncture in time the Defendants had been in contact with Holt Adoption Program in Creswell, Oregon, which is a non-profit agency devoted to handling the adoption of orphan children in Korea by American citizens.

The Defendants are black and were interested in adopting a mixed-blood Korean and black orphan from Korea. The Plaintiff is also black, which made his daughter eligible for adoption by the Defendants.

A Korean orphan girl of mixed Korean and black blood whose date of birth was shown to be the same as that of the Plaintiff's daughter, was processed for adopion from the Holt Adoption Program in Seoul, Korea, and sent to the Defenants' home in Chattanooga, but her name was given as Kim Ji Yung.

The factual issue in this litigation is whether or not Kim Ji Yung is, in fact, Kimta Francoise Taylor, the daughter of the Plaintiff.

The proof shows that there are many orphaned, abondoned children in Korea. This is particularly true of children of illegitimate birth who have been sired by servicemen stationed in Korea. Under social standards of Korea a mixed-blood child, whether it be Korean and Caucasian or Korean and black, is not accepted into their society and is ostracized by the Korean people. This is responsible for many unwed mothers' deserting their mixed-blood children.

When those abandoned children are found they are usually turned over to the police and placed in an orphanage and then placed for adoption.

The records of Holt Adoption Program show that Kim Ji Yung was found on February 15, 1971, in the An Yang Eup area of Seoul, which is the same area in which Kimta Francoise Taylor had been living, and she was placed with Holt Adoption Agency for adoption as a mixed-race child. The date of birth is shown to be June 6, 1967, but the record is not clear as to how this information was obtained. Since the parents of the child were unknown, it was given the family name of Kim Ji Yung.

Korea has a civil code of procedure governing the adoption of children by non-citizens and these procedures were followed in the placement of Kim Ji Yung for adoption by the Defendants.

The chronology of this procedure was as follows: On July 22, 1971, the family name of Kim Ji Yung was established. On July 24, 1971, Deuk Hwang Kim was appointed as her guardian by the Mayor of the Special City of Seoul. On the same date he executed a consent for her to be immigrated to the United States for adoption by suitable parents. In this same document he transferred to the Holt Adoption Program, Inc., all of his rights as guardian, including the right to place her in an adoptive home and to consent to her adoption.

On July 26, 1971, the Chief of the Ma Po District Office, Seoul, Korea, issued the following certificate upon the request of the Holt Adoption Program, Inc.: "This is to certify that the following-described child is a legal orphan, abandoned by its parents, and that said child is a nonsuccessive orphan in accordance with a census register provided by his district office."

On February 14, 1972, Kim Ji Yung was issued an IR-4 Visa (Orphan to be adopted in the United States) and on February 24, 1972, she left Korea for the home of the Defendants. She was met by the Defendants in Chicago and taken to their home in Chattanooga.

During this interval of time the Plaintiff had continued correpsondence with people and agencies in Korea endeavoring to make arrangements to have his daughter brought to the United States. He had pur-

chased on airline ticket for her from Pan American World Airways and had sought their assistance. In March, 1972, Pan Am wrote to the Plaintiff advising him that at attorney in Seoul with whom the Plaintiff had been correpsonding informed them the latter part of December that his daughter was at Holt Adoption Agency.

The Plaintiff then contacted Holt Adoption Agency in Creswell, Oregon, to ascertain whether or not they had his daughter or had placed her for adoption. He was told they would check. He also sent them a picture of his daughter and a copy of her birth certificate but received negative results.

The Plaintiff then wrote to his congressman and to President Nixon soliciting their support in locating his daughter.

As a result of these efforts his congressman received a letter from the Department of State dated April 3, 1972, which read, in part, as follows: "The Department of State has been informed by the American Embassy at Seoul, Korea, in response to its recent inquiries in this matter, that the child was issued an IR-4 Immigrant Visa (Orphan to be adopted in the United States) on February 14, 1972, in the name of Kim Ji Yung and left Korea on February 24 destined for her adoptive parents, Mr. and Mrs. Walter Lee McElroy, 100 Arlington Terrace,

Chattanooga, Tennessee. A member of my staff informed Mr. Taylor of the foregoing by telephone on March 30."

It was this information which precipitated this litigation.

It is the insistence of the Defendants that there was no competent proof that Kim Ji Yung was one and the same person as Kimta Francoise Taylor.

We cannot agree. The Plaintiff identified the photograph of the child, furnished by the Holt Adoption Agency, as his daughter, and when he saw the child he further recognized her as his daughter.

The Court filed a memorandum opinion in which he found, in part, as follows: "Some question has been raised whether or not the child before the Court is the same child as the natural child of Mr. Taylor; but the Court having personally viewed the child in open court and having viewed many photographs which are exhibited in evidence taken over a period of years from the birth of the child and from the testimony and other documents in the record, is firmly convinced that the natural child of Mr. Taylor is the same child as that before the Court."

The Court also said in its memorandum opinion: "The Court finds that the petition for adoption by the McElroy's must be dismissed because the child sought to be adopted by them is the natural child of Richard

Louis Taylor and his former Korean wife, Kyong Cha Taylor, and that the parental rights of Richard Louis Taylor have not been lawfully terminated. Upon this point the Court finds specifically that the father, Richard Louis Taylor, never at any time abandoned said child nor did he ever voluntarity surrender said parental rights nor in any way relinquish said rights voluntarily."

We think the evidence supports the findings of fact by the Chancellor and we concur (except, of course, we did not see the child or the Plaintiff).

Defendants insist in their first two assignments of error that it was error for the Chancellor to fail to apply the "Act of State Doctrine."

We cannot agree. In order for action taken by a foreign government to fall within the "Act of State Doctrine," the action must have been taken by the sovereign nation rather than a subdivision of that government. 12 A.L.R. Fed. 339.

The only action taken in Korea relating to the case at bar was administrative action by officers of the City of Seoul.

In support of Defendants' third assignment or error they argue, "The testimony concerning the indentification of the McElroys' child as being Taylor's reported illegitimate child is hearsay and the Chancellor's deci-

sion should be reversed in the absence of testimony from the child's mother identifying the father and in the absence of admissible evidence conclusively identifying the child."

Again, we cannot agree. The proof shows the Plaintiff married the child's mother after its birth and under Korean law the child was legitimized by this marriage. After the child was legitimized we think she stands in the same posture as if she were of legitimate birth.

By the same token, we think the Plaintiff could testify as to their parent and child relationship. Also, the Plaintiff testified that upon his return to Korea to marry Kim Kyong Cha she told him that Kimta Francoise Taylor was his daughter and we think this is competent evidence as an exception to the hearsay rule relating to pedigree. *Swink v. French,* 79 Tenn. 78 (1883); 29 Am.Jur.2d, Evidence, 5508.

The assignment of error are overruled. The decree of the Chancellor is affirmed and the cost of this appeal is taxed to the Appellants.

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1975.

No 75-102

WALTER LEE McELROY AND VIRGINIA McELROY,
Petitioners,

vs.

RICHARD LOUIS TAYLOR,
Respondent.

BRIEF OF RESPONDENT RICHARD LOUIS TAYLOR IN OPPOSITION.

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BRIEF OF RESPONDENT RICHARD LOUIS TAYLOR IN OPPOSITION.

The issues presented in the Petition for *Certiorari* do not arise on the record below. First, the facts of this case, only a portion of which are set forth by petitioners, are unique and belie petitioners' contention that the resolution of this case "raises significant questions as to the legal status of large numbers of foreign born children who have been adopted in the United States." Second, the so-called "Act of State" doctrine simply has no place in this lawsuit. Both of these factors make *certiorari* inappropriate in this case.

REASONS FOR DENYING THE WRIT.

1. The Facts of the Case are Unique.

This is the story of an American serviceman, Richard Taylor, who fathered a child while stationed in South Korea and who attempted to bring her to this country and to obtain custody of

her.[1] Respondent Richard Taylor was stationed in Korea in 1967. During his tour of duty, Mr. Taylor became the father of a "mixed-blood" Korean child, Kimta Francoise Taylor. After his discharge from the service, Mr. Taylor returned to Korea to marry the mother of his child, to obtain American citizenship for the child, and to bring his family to the United States. Having accomplished his first two objectives, respondent Taylor was unable to secure the prompt issuance of a visa and a passport for his wife and was forced to return to the States without his family, but with the understanding that his wife and daughter were soon to follow.

Mr. Taylor returned to the States in April, 1968. After his return, respondent maintained communications with his wife through June, 1970. During this period, the wife insisted that the delay in coming to the States was caused by her inability to obtain a visa. However, in March of 1971, respondent learned that his wife had changed her mind about coming to the States, had abandoned the child with a mutual friend in July of 1970, and had not been seen since. The undisputed record in this case is that from March, 1972, Mr. Taylor did everything in his power to locate his daughter and to bring her to the United States. He sent money to the friend who had the child, and when he could afford to do so, sent a one-way airline ticket. Mr. Taylor solicited the assistance of both the State Department and Pan American World Airways and through the latter he learned in March, 1972, that his daughter had been placed with the Holt Adoption Agency. Respondent immediately contacted the Holt Adoption Agency to seek their assistance. Mr. Taylor sent Holt pictures of the child, her birth certificate, and an explanation of his situation. Holt was of no assistance to Mr. Taylor.

1. The facts presented in this section are taken from the Tennessee decisions reproduced in the Appendix to the Petition for Certiorari, and are not in dispute. References to that Appendix are as follows (App. ....).

In fact, Mr. Talor's child had been placed with the Holt Agency in February, 1971. Sometime during July, 1971, Holt initiated certain administrative procedures in Korea which resulted in Kimta Taylor being declared an orphan and Holt being appointed the child's guardian with the power to place the child for adoption. Holt then arranged for the adoption of the child by the McElroys, the petitioners in this matter. In February, Holt secured an IR-4 visa (orphan to be adopted in the United States) for the child and placed her on a plane to the States.[2]

Mr. Taylor learned of these latter events and the impending adoption, not from the Holt Agency, but from the Department of State in March of 1972. In March, 1972, the McElroys initiated adoptive proceedings in the Chancery Court of Hamilton County, Tennessee. Mr. Taylor intervened in these proceedings and sought to secure the custody of his natural child. After a full hearing, the Tennessee court found in favor of Mr. Taylor's claim, declaring: (a) that respondent Richard Taylor is a "fit and proper person to have custody" and indeed is the natural father of the child up for adoption; and (2) "Mr. Taylor has divorced the Korean mother of said child and has remained and is able, financially, socially and in other ways, to afford a proper home for the upbringing of said child." (App. 24.)

2. The Holt Adoption Agency has sought leave to file an *Amicus Curiae* brief in this mattter. It cannot go without notice that if there is one party to this entire proceeding that could have avoided this human tragedy it is Holt. However, for reasons known only to the Holt Agency, it chose simply to continue the arrangements it had made for the child's adoption. When the fight arose over the adoption it had arranged, Holt refused to cooperate with the Tennessee courts, causing the Judge to comment:

> The Court is further convinced that the Holt Adoption Agency has not been helpful to the Court on the information available to it up to this point, although it did make said information known to the U. S. Department of State because the Department of State knew the date, the hour and the flight that said natural child of Mr. Taylor was placed on in Seoul, Korea for destination to Chicago, Illinois and eventually to be adopted by the McElroy's in Chattanooga.

(App. 24).

The decision to place Kimta with her natural father was affirmed by both the Tennessee Court of Appeals and the Tennessee Supreme Court.

The fact that a Tennessee Court chose to award Kimta Taylor to her natural father, after an adoption contest, does not jeopardize the legal status of a single Asian child adopted in this country. The Tennessee decision was carefully drafted to resolve the unique issue posed by the facts of this case and is expressly limited in this regard. The legal status of those Asian children who, unlike Kimta Taylor, were legally adopted in this country, remains the same. Under these circumstances, the petition should be denied.

2. The Act of State Doctrine, if at All Applicable to This Case, Has Not Been Violated.

Petitioners seek the issuance of the Writ of *Certiorari* on the sole ground that the Tennessee Courts erred in declining to apply the "Act of State" doctrine to this case. The "Act of State" relied upon by petitioners is an administrative proceeding in Korea in which Kimta was given a new name and Holt was appointed guardian with the power to consent to Kimta's adoption. These administrative procedures were established to facilitate the adoption of mixed-blood Korean children. Holt exercised its authority as the child's guardian when it consented to Kimta's adoption by the McElroys in the United States. Any interest Korea had in the adoption of Kimta Taylor ended once her guardian placed her up for adoption.

The adoption proceedings, however, took place in Tennessee, not in Korea. Mr. Taylor intervened in the Tennessee proceedings and contested the adoption. The Tennessee Courts looked to Tennessee law to decide whether to place Kimta with Mr. Taylor, her natural father, or with the McElroys.

The Korean government has absolutely no interest in the adoption proceedings themselves, particularly in the question of

whether Kimta is placed with her natural father or with the McElroys. To suggest that Korea has any legitimate interest in the actual placement of Kimta is ludicrous in light of the fact that Korea has no place for mixed-blood children like Kimta in its own society and in fact considers them outcasts, or non-citizens. The decision to place Kimta with her natural father was properly resolved by a Tennessee Court under Tennessee law.

CONCLUSION.

The question posed by petitioners does not arise in this record. For this reason, Petition for *Certiorari* should be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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Holt Adoption Program, Inc., hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of an attorney for respondent has not been obtained because respondent's attorney in the proceedings in state court resigned after the filing of the petition for certiorari and, although the court has directed respondent to reply to the petition, no appearance by counsel on behalf of respondent has been filed with the court.

The interest of Holt Adoption Program, Inc., arises from that fact that it arranged the adoption of the Korean child by petitioners, is successor to the guardian appointed for the child in Korea and consented to the adoption of the child by petitioners in Tennessee. The action of the Tennessee Court of Appeals, holding the Korean proceedings void, directly involved petitioners' interests. Holt Adoption Program, Inc., is also interested in this case because it has arranged for the adoption of over fifteen thousand Korean children in the United States and in Europe and has relied upon similar Korean proceedings to perfect these adoptions. If the Korean proceedings terminating parental rights and vesting right to consent to adoption in a guardian can be held void in local courts on the grounds of local public policy, the status of other children whose adoption proceedings involved reliance upon the Korean procedures and consent of a Korean guardian is in question.

It is believed that the Act of State question involved in this case is of extreme importance and was not adequately dealt with by the state courts. The brief of amicus curiae contains a more complete exposition and argument on the Act of State doctrine as it relates to this case than could be presented by the petition for certiorari.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY HOLT ADOPTION PROGRAM, INC. AS AMICUS CURIAE

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY HOLT ADOPTION PROGRAM, INC. AS AMICUS CURIAE

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review a decision of the Tennessee Court of Appeals. The Tennessee Court of Appeals refused to apply the Act of State doctrine to acts of the Republic of Korea which terminated Respondent's parental rights in a minor child that Petitioners were seeking to adopt in Tennessee. Korean officials had issued a family registration

as an orphan and appointed a guardian for the child with power to consent to adoption. Petitioners sought to adopt the child in a Tennessee Court with the guardian's consent. Respondent claimed to be the natural father of the child and objected to the adoption. The Tennessee Courts held the acts of the Korean government terminating parental rights and appointing the guardian void on the grounds that inadequate notice had been given to Respondent.

INTEREST OF HOLT ADOPTION PROGRAM, INC.

The Holt Adoption Program, Inc. is a non-profit corporation, incorporated in the State of Oregon. It is engaged in arranging inter-country adoptions of children.

The Holt Adoption Program began in 1956 when Harry and Bertha Holt, from Creswell, Oregon, became concerned about the plight of mixed race children in Korea. They adopted eight children themselves and then began to arrange adoptions of Korean children for other persons in the United States, and ultimately established the Holt Adoption Program, Inc. (Tr. 291).

Holt Adoption Program is licensed by the Korean government as an adoption agency and also operates an orphanage in Korea. It cares for children in Korea which are placed with it by the Korean government. (Tr. 295-296). The Holt Adoption Program receives applications from persons interested in adopting Korean children. It cooperates with child welfare

departments and private agencies in all fifty states to screen and gather information about applicants and match such applicants to Korean children in the custody of Holt Adoption Program and available for adoption. (Tr. 297-299). The children are brought to the United States and adopted through the courts in the state where the adoptive parents live, with the assistance of the cooperating child welfare department or social agency. (Tr. 299).

The interest of the Holt Adoption Program in this case is both direct and indirect. It is directly interested because the child involved was placed through Holt Adoption Program. The Holt Adoption Program was contacted by the petitioners and made all arrangements for the adoption. The guardian appointed for the child was a representative of Holt Adoption Program and subsequently transferred guardianship rights to Holt Adoption Program. Holt Adoption Program brought the child to the United States, assisted the Tennessee Welfare Department in arranging the adoption procedure and consented to the adoption. The action of the Tennessee Court of Appeals in refusing to perfect the adoption and holding Holt Adoption Program's guardianship and capacity to consent to adoption void directly affects Holt Adoption Program's interest in the welfare of the child.

Holt Adoption Program is also indirectly affected by the decision of the Tennessee Court of Appeals. The procedures followed in this case in Korea to secure capacity consent to

adoption are similar to those followed in the adoptions of twelve thousand other Korean children in the United States prior to 1973, and three thousand adoptions of Korean children in other countries. In all these cases, Holt Adoption Program has relied upon the acts of the Korean government to vest guardianship authority and capacity consent to adoption in it, and the adoptions have been perfected by the consent of Holt Adoption Program. The possibility that state courts could invalidate these adoptions by refusing to recognize the Korean guardianship proceedings as contrary to the public policy of the forum is a matter of extreme concern to Holt Adoption Program. It has been, and remains, vitally interested in the security and welfare of these children. The decision of the Tennessee Court of Appeals jeopardizes the security and welfare of these children by jeopardizing the validity of their adoptions in the United States.

SUMMARY OF ARGUMENT

The Act of State doctrine is a special choice of law rule that prevents American courts from reviewing the validity of acts of foreign states. The Tennessee Court of Appeals in this case held that the Korean family registration as an orphan and appointment of a guardian, which terminated Respondent's parental rights and vested the right to consent to adoption in the guardian, void based upon local public policy.

The Tennessee Court of Appeals refused to apply the Act

of State doctrine because the acts had been done by local Korean government officials as opposed to national Korean government officials. The question presented under the Act of State doctrine, however, is not the identity of the actors, but the nature of the act and the relationship to the interests of the state. The argument of amicus addresses itself primarily to the issue of whether the acts covered by the Act of State doctrine.

Not all acts of a foreign government are immune from review in American courts under the Act of State doctrine. If the acts are not of the type covered by the Act of State doctrine, they are subject to the ordinary choice of law rules that would allow the Tennessee Court to refuse to recognize the acts on the grounds of local public policy.

Whether the acts of a foreign state fall within the Act of State doctrine depends upon whether the acts involved should be protected from review by American courts according to the rationale underlying the Act of State doctrine. The purpose of the Act of State doctrine is proper distribution of authority between the judicial and executive branches of our government in the conduct of foreign affairs. The refusal to review an act of a foreign government is necessary where the act is of such a nature that a review by local courts would be justifiably offensive to the acting government and create a foreign relations problem in the United States. This requires the court to examine the act in context and determine the relationship of the act to the national interests of the acting state.

In this case the termination of parental rights and appointment of a guardian was not a settlement of a private dispute, but a procedure adopted by the Korean government to facilitate the foreign adoption of mixed race children born in Korea. Mixed race children are excluded from Korean society and securing care and families for such children is a Korean national problem. The refusal to accept the validity of the acts undertaken by the Korean government, to solve this problem through foreign adoption, frustrates the national goals of the Korean government and would be offensive to them and thus presents a foreign relations problem for the United States.

ARGUMENT

I. THE APPLICATION OF THE ACT OF STATE DOCTRINE DOES NOT DEPEND UPON WHICH OFFICIAL OF THE FOREIGN GOVERNMENT ACTS ON BEHALF OF THE STATE.

The basis for rejection of application of the Act of State doctrine to this case by the Tennessee Court of Appeals was the nature of the actors. The Tennessee Court distinguished an action of a sovereign nation from an action of a subdivision of the government of that nation and held that the Act of State doctrine did not apply to "administrative action by the officers of the City of Seoul, Korea... *In Re Adoption By McElroy*, 522 SW 2d 345, 349 (1975).

This basis for avoidance of the application of the Act of State doctrine is palpably incorrect and avoids the real issue

presented by this case.

No other American court has made this distinction a basis for rejection of the Act of State doctrine. The only authority cited by the Tenessee Court of Appeals is an ALR Fed. Annotation which does not support its position.[1]

The decision denying application of the Act of State doctrine based upon the exact position of the actors in the governmental hierarchy of Korea is illogical. It has no relationship to the ultimate question of whether the acts involved are of a nature to which protection should be given under the Act of State doctrine to achieve the purposes of that doctrine.[2] Clearly, if the acts involved were not done with some authority or sanction of the foreign state, the Act of State doctrine would not apply.[3] On the other hand if the acts are within the laws of the state and done to effectuate state policy, the person selected by the state to actually do the acts is immaterial.[4] In some cases states can call upon private

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(1) Actually the citation at 522 SW 2d 349 is to 12 ALR Fed. 339, which is an Annotation relating to immunity from private liability under the anti-trust laws. The Tennessee Court must have intented to cite the Annotation at 12 ALR 2d 707 "Modern Status of the Act of State Doctrine." Section 5 of that Annotation, at page 739, deals with the meaning of "state" but the cases cited and the discussion relate only to the status of a political entity in the international community and not who can act on behalf of the State under the Act of State doctrine. There is no question in this case that the Republic of Korea is a state within the meaning of that concept under the Act of State doctrine.

(2) *Restatement of Foreign Relations Law*, Sec. 41, comment d, p. 127 (1965).

(3) *Jimenez v. Aristeguieta*, 311 F. 2d 547 (5th Cir. 1962), cert. den. 373 U.S. 914, reh. den. 374 U.S. 858.

(4) Reeves, *The Sabbatino Case*, 32 *Fordham L. Rev.* 631, 647-648 (1964).

individuals to act on behalf of the state and these can and have been defined as acts of state.[5] In the present case it is not necessary to decide whether private persons could perform an act of state because the District Chief and Mayor of Seoul, Korea who performed the acts involved were clearly public officials whose authority to engage in the acts was given by Korean law, and who acted in a governmental capacity.

The implied assumption in the Tennessee Court of Appeal's opinion that the officials involved were not somehow not agents of the national Korean Government is invalid, both because their acts were authorized by national law (see Exhibit 18, page 3-5) and because of the centralized administrative structure in Korea under which at least the Mayor of the Special City of Seoul, Korea is a national official under the direction of the ministry of home affairs.[6]

II. THE ISSUE PRESENTED BY THIS CASE IS WHETHER THE ACTS OF THE GOVERNMENT OF THE REPUBLIC OF KOREA WHICH TERMINATED RESPONDENT'S PARENTAL RIGHTS AND VESTED THOSE RIGHTS IN A GUARDIAN ARE THE TYPE OF ACTS WHICH ARE COVERED BY THE "ACT OF STATE" DOCTRINE.

(5) For example, *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 NY 474, 14 NE 2d 798 (1938); see discussion in *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 Fed. 2d 246, 248 (2nd Cir. 1947) cert. den. 332 U.S. 772; see also Goldie, *The Sabbatino Case:* International Law versus the Act of State, 12 *UCLA L. Rev.* 107, 125, Fn 79 (1964).

(6) See U.S. Army, *Area Handbook for Korea*, 215-217 (1964); Chae, *Handbook of Korea*, 128-136 (1958).

A. THE APPLICATION OF THE ACT OF STATE DOCTRINE IS NOT LIMITED TO EXPROPRIATION OF PROPERTY BY FOREIGN GOVERNMENTS.

The real question presented by this case is whether the family registration as an orphan and the appointment of a guardian which cut off Respondent's parental rights and vested these rights in a guardian are acts which fall within the Act of State doctrine. Clearly these were actions of the Korean government, but were they "acts of state" within the meaning of that term in the courts of the United States, and thus immune from review by United States court?

Some actions of foreign states have been historically treated as "acts of state" whereas other actions have been treated under other choice of law rules.[7] Ordinary choice of law rules are frequently applied to foreign judicial decisions and the validity of such decisions is subject to review in American courts and may be held void on the grounds of the public policy of the forum.[8]

The recent development of the Act of State doctrine in the United States has been in the context of foreign expropriations of property.[9] The application of the Act of State

(7) Goldie, *supra*, note 5, 114.

(8) Cornell Law School, *International Law in National Courts, Proceedings of the 3rd Summer Conference on International Law*, 64 (1960).

(9) *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First National City Bank v. Banco Nacional De Cuba*, 406 U.S. 759 (1972).

doctrine in these expropriation cases has been exhaustively examined by the courts and text writers, but the legal literature contains almost no discussion of what other types of state acts qualify for treatment under the Act of State doctrine. (10)

It is clear that the Act of State doctrine is not limited to expropriation cases. Cases applying the Act of State doctrine have frequently involved other types of state action, but none of the courts involved has directly addressed the issue of what kind of state acts qualify for the special treatment of the Act of State doctrine. (11)

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(10) Lillich, *The Protection of Foreign Investment; Six Procedural Studies*, 45 Fn. 1 (1965); Note, Mitigating the Rigors of the Act of State Doctrine: The General Principles of Law Recognized by Civilized Nations; 20 *Syracuse L. Rev.* 705, 715 (1969).

(11) The first United States Supreme Court case explicitly dealing with the Act of State doctrine did not involve an expropriation of property. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), the acts involved were assault and false imprisonment. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) involved harrassment and obstruction of the construction of a railroad as well as expropriation of property. Other cases involving the act of state doctrine where the acts involved were not solely expropriation of property are: *Carl Ziess, Stiftung v. V.E.B. Carl Ziess, Jena*, 293 F. Supp. 892 (S.D. N.Y. 1968), affirmed 433 F 2d 686 (2nd Cir. 1970), cert. den. 403 U.S. 905; *Hewitt v. Speyer*, 250 F. 367 (2nd Cir. 1918); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.C. Del. 1970); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971); Affirmed 461 F. 2d 1261 (9th Cir. 1972) cert. den. 409 U.S. 950; *Steingut v. Guaranty Trust Co. of New York*, 58 F. Supp. 623 (S.D. N.Y. 1944); *Union Shipping & Trading Co. v. United States*, 127 F. 2d 771 (2nd Cir. 1942); *Vanity Fair Mills v. T. Eaton, Co.* 234 F. 2nd 633 (2nd Cir. 1956) cert. den. 352 U.S. 871; *U.S. ex rel., Von Heymann v. Watkins*, 159 F. 2nd 650 (2nd Cir. 1947); *U.S. ex rel., Stienvorth v. Watkins*, 159 F 2nd 50 (2nd Cir. 1947); *Frazier v. Foreign Bondholders*, 283 App. Div. 44, 125 N.Y. 2d 900 (1953); *French v. Banco Nacional De Cuba*, 23 NY 2d 46, 295 N.Y.S. 2d 433, 242 NE 2d 704 (1968); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277

The decision by the Tennessee Court of Appeals not to recognize the termination of parental rights and appointment of guardian by Korea was based upon the public policy of the State of Tennessee. If these acts were "acts of state" this clearly was improper. The question then of the type of acts which fall within the Act of State doctrine is directly presented by this case.

B. THE GENERALLY ACCEPTED DEFINITION OF AN ACT OF STATE IS AN ACT BY A FOREIGN STATE WHICH GIVES EFFECT TO THAT STATE'S PUBLIC INTERESTS.

The development of a workable test for distinguishing acts of state from other acts of a foreign government is difficult. (12) The American Law Institute in its *Restatement of Foreign Relations Law* encountered considerable difficulty in formulating a definition of acts of state. The tentative draft of the section dealing with acts of state said:

> ". . . the term 'act of state' means an act by which a state prescribes or enforces rules attaching legal conse-

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NY 474, 14 NE 2d 798 (1938); *New York Times Company v. City of New York*, 362 N.Y. S. 2d 321, 79 Misc. 2d 1046 (1974); *South African Airways v. New York State Division of Human Rights*, 315 N.Y. S. 2d 651 (1970); *Wells Fargo and Co., Express S.A. v. Tribolet*, 46 Ariz. 311, 50 P2d 878 (1935.

(12) For example, Falk, *The Aftermath of Sabbatino*, 57 (1965), raises the question of the application of Act of State doctrine to acts other than expropriation but never deals with the issue; *Goldie, supra*, Note 5, 114-117, spends four pages pointing out the vagueness of the definition of the acts covered by the Act of State doctrine and criticizing the approach used by the *Restatement of Foreign Relations Law*, but does not provide a workable test of acts of state. See also Cornell Law School *supra*, Note 8, 61-70.

quences to conduct, including rules relating to property status and other legal interests, determining or giving effect to the interest of the acting state as a state as distinguished from action by that state determining or giving effect to interests of a private nature." *Restatement of Foreign Relations Law, Tentative Draft No. 4,* Sec. 28 a, P. 2 (1960).

The proposed official draft, in 1962, used the following approach:

". . . (c) The foreign state has prescribed and enforced a law determining or giving effect to the public interest of that foreign state." Sec. 41, P. 128.

"Judgments of courts may be, but usually are not, acts of state, either because they involve the interests of private litigants, including the state itself as a party claiming interests of an essentially private or proprietary nature, or because the public interest of the state that private disputes be settled is not thought of as a matter of high state policy." Comment C. p. 130.

The version of the *Restatement of Foreign Relations Law* that was finally adopted defines an act of state as:

". . . an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." Sec. 41, p. 125.

"Nature of act of state. An 'act of state' as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. In determining whether an act is an act of state, the branch or agency of the government — executive, judicial, or legislative — that performed the act is not as important as is the nature of the action taken. A judgment of a court may be an act of state.

Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to to give effect to its public interests." Comment d, P. 127. 13

C. IF JUDICIAL REVIEW OF AN ACT OF A FOREIGN STATE BY LOCAL COURTS WOULD BE JUSTIFIABLY OFFENSIVE TO THE ACTING STATE THIS WOULD JEOPARDIZE THE CONDUCT OF THE FOREIGN AFFAIRS OF THE UNITED STATES AND THE ACT INVOLVED IS AN ACT OF STATE.

The restatement approach does focus upon the relationship between the act and the interests or goals of the foreign state. The definition, however, does not provide a basis for determining when acts involve the "public interests" of a state in such a way that the acts should be immune from review by foreign courts.

The problem is that almost any act of a state involves its public interest to some extent. A state would have some public interest in having the decisions of its courts upheld in foreign countries. The question is when is the public interest of a state sufficient that the acts should be immune from review in foreign courts? This question can only be answered by looking at the purpose underlying the application of the Act of State doctrine in United States Courts.

In *Banco Nacional De Cuba v. Sabbatino,* 376 U.S. 398

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(13) Reeves, *supra,* Note 4, 639 (1964); Note, The Act of State Doctrine - Its Relation to Private and Public International Law, 62 *Col. L. Rev.,* 1278, 1288 (1962).

(1964) the court identified the purpose of the Act of State doctrine as distribution of functions between the legislative and judicial branches of government relating to the conduct of foreign affairs.14 The court then identified four specific considerations for determining the proper distribution of functions in dealing with expropriations of property by foreign states:

(1) The extent of consensus or codification on the subject in international law;
(2) The importance of the implications of an issue for our foreign relations;
(3) Whether the government which acted still exists; and
(4) The presence or absence of a treaty or other unambiguous agreement regarding the controlling legal principles. 15

The functional analysis used by the court in the *Sabbatino* case provides a method of examining any act of a state to determine if it falls within the Act of State doctrine. The *Sabbatino* case dealt with the act of expropriation of property but the general purpose of the Act of State doctrine is a ". . . proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 16 The more specific questions considered in the *Sabbatino* case to determine the proper distribution of

(14) 376 US at 427-428.
(15) 376 US at 428.
(16) 376 US at 427-428.

functions all bear upon the probability of a legitimate adverse reaction by the acting state if our courts attempt to review the validity of the act:

(1) Presumably a judicial decision applying a clearly established rule of international law would be less offensive than applying local policy or a questionable international law rule;
(2) The question of the existence of important implications for foreign relations is clarified by the Court's statement that ". . . some aspects of international law touch more sharply on national nerves than do others;" 17 This suggests that the likelihood of a state being disturbed by review of its acts in the courts of another country is the factor that would raise important implications for our foreign relations;
(3) Presumably if the act was that of a government no longer in existence, the likelihood of offense by that government is gone and embarrassment of foreign is diminished; and
(4) The existence of a treaty or other unambiguous agreement regarding the controlling legal principles would provide a basis for judicial review of the act in the courts of another state which should not be offensive to the acting state.

(17) 376 US at 428.

The specific factors used by the *Sabbatino* court to determine if the Act of State doctrine should be applied are all considerations in determining whether under the circumstances a review of the particular act would be offensive to the foreign state and create a foreign relations problem for the United States. 18 The questions presented are how important is immunity from review to the existing government of the acting state and to what extent under existing custom, international law and treaties does the acting state have a legitimate expecta-

(18) See Cornell Law School, *supra*, Note 8, 94; Note, Mitigating the Rigors of the Act of State Doctrine: The General Principle of Law Recognized By Civilized Nations, 20 *Syracuse L. Rev.* 705, 718 (1969).

For general discussion of this analysis, see Falk, *supra*, Note 12, 18-20. The analysis bears some similarity to that used to determine when a political question arises. The Court in *Baker v. Carr*, 369 US 186 (1962), discussed the political question cases involving foreign relations such as existence of a treaty, recognition of foreign government, sovereignty over territory, etc. The Court said:

> "Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." 369 US 211-212.

See Note, The Act of State Doctrine - Its Relation to Private and Public International Law, 62 *Col. L. Rev.*, 1278, 1283-1286 (1962).

This similarity has led at least one commentator to assert that the Act of State cases should be treated simply as another form of political question. Norton, Reflections on The Act of State Doctrine; A Fifth Wheel in the Conflict of Laws, 10 *Houston Law Review* 1 (1972). This approach, however, is clearly not appropriate. The questions raised are similar but not identical. *Baker v. Carr* had been decided before the *Sabbatino* case, and was not used as the basis for analysis of the Act of State doctrine by the Supreme Court. The federal question doctrine is based on constitutionally required separation of powers whereas the Sabbatino court very carefully pointed out that the Act of State doctrine is not constitutionally compelled, see 376 US 423.

tion that such acts will be immune from review.

This is recognized in the comments following Sec. 41 of the *Restatement of Foreign Relations:*

> "However, when a court applies the act of state doctrine, it does so under circumstances that require it to weigh the effect, on the relations between the state in which it sits and the foreign state, of its possible disregard of the public interests of the foreign state that are reflected in the act in question. It is this factor that differentiates act of state cases from routine cases involving conflict of laws decisions. When an agency of another state has taken action affecting legal relationships of persons or things within its territory and has done so in a manner which makes it clear that it is giving effect to the public interests of the state, the act of state doctrine precludes a court in the United States, except as provided by statute, from examining such action. The policy underlying the doctrine is that the courts should abstain from any action that might hinder the executive branch of the government in the conduct of foreign relations." Comment C, p. 127.

D. UNDER THE CIRCUMSTANCES OF THIS CASE, HOLDING THE ACTS OF REPUBLIC OF KOREA VOID BECAUSE OF LOCAL PUBLIC POLICY WOULD BE OFFENSIVE TO THE REPUBLIC OF KOREA AND WOULD AFFECT THE CONDUCT OF FOREIGN RELATIONS BY THE UNITED STATES.

The acts involved in this case are termination of parental rights in a Korean minor child and transfer of those rights to a guardian. If these acts had been a judicial decision to resolve a private dispute as to custody or parental rights, the case would be no different from any other foreign judgment and the Act

of State doctrine would not apply. The Act of State doctrine, however, does apply in this case because the acts were not a judicial settlement of a private dispute, but administrative action by Korean officials to solve a national problem in Korea.

To put the acts involved in context, some understanding of Korean society is necessary. The primary element of social organization in Korean society is the extended family and the establishment of a family relationship through the Korean family registration system is vital to participation in Korean society. (19) The testimony presented in this case shows that lack of identification with a family unit through formal family registration results in inability to participate in Korean society.(20)

The second aspect of Korean society that is important to this case is the problem of the treatment of mixed race children in Korea. The problem is presented by children who are born of relationships between Korean women and the large numbers of American servicemen who have been in Korea since 1958.(21) Being of non-Korean paternal parentage, the children cannot be affiliated with any established family through registration by the father. The Korean government attempted to deal with

(19) U.S. Army, *supra*, Note 6, 77-90 (1964).

(20) Tr. 309-311.

(21) Tr. 292-293, 346.

this by providing for family registration through the mother, but family and societal pressures against acknowledging the birth of these mixed race children caused the mothers not to register the children as members of their family and to the frequent abandonment of the children.22 The Korean government is thus faced with the problem of a substantial number of children23 who are not receiving care and family attention and who have no future prospects of being assimilated by Korean society. One potential solution to this problem is foreign adoption of these children.24 The registration of these mixed race children as a new family and the appointment of a guardian with power to consent to the adoption in a foreign country of these children are means to effectuate a policy of encouraging foreign adoption of mixed race children.

Under these circumstances the termination of Respondent's parental rights and vesting of these rights in a guardian appointed by the Korean government was an act of state. The Korean government has a direct state interest in the validity of these acts as a means of solving the national problem of mixed race children. Korea has not agreed by to a review of these

(22) Tr. 307-308, 310-311.

(23) Some indications or the dimensions or the problem is given by the fact that Holt Adoption Program, as one of many adoption agencies, placed over 15,000 Korean children for adoption between 1956 and 1973. Tr. 293-294.

(24) Adams and Kim, A Fresh Look at Intercountry Adoptions, 18 *CHILDREN* 214, 218 (1971).

acts in American courts and no settled principle of international law subjects these acts to review in foreign courts. Allowing American state courts to invalidate these acts will frustrate a Korean national objective and could offend the Korean government and thus impair our conduct of foreign relations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and the Judgment of the Tennessee Court of Appeals should be reversed.

Respectfully Submitted,

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